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In The

Supreme Court of the United States

October Term, 1976

No. 76-899

McGRAW-EDISON COMPANY,

Petitioner,

v.

BETTY SOPER and JEFFSON INDUSTRIES, INC.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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The Petitioner prays that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in the above-entitled case on September 29, 1976, and on which a Rehearing and Rehearing En Banc were denied on November 15, 1976.

OPINION BELOW

The Opinion of the Eighth Circuit Court of Appeals is reported in 542 F. 2d 1336 and is printed in Appendix A. The pertinent portions of the judgments of the District Court for the Western District of Missouri, Western Division and the pertinent portions of its Findings of Facts and Conclusions of Law are printed in Appendix B.

JURISDICTION

Jurisdiction to review the judgment below by Writ of Certiorari is conferred by 28 U. S. C., Section 1254 (1). Jurisdiction of the Trial Court was based upon 15 U. S. C., Section 1 and 28 U. S. C., Sections 1332 and 1337.

QUESTIONS PRESENTED

1. Whether the licensing of a Franchised name in connection with the sale of a "package" dry cleaning store is a *per se* violation of the Sherman Act and automatically illegal without the need of further inquiry as to whether any unreasonable competitive effects result.

2. Whether a violation of the Sherman Act under the *per se* doctrine can be predicated on the licensing of a Franchised name whose only relationship to the equipment being sold is an advertising and promotional program.

3. Whether a violation of the Sherman Act can be shown in the absence of evidence of individual coercion.

4. Whether, a sale of an existing facility including equipment and the right to use a Franchised name constitutes an illegal sale in violation of the Sherman Act.

STATUTES INVOLVED

The statutory provisions involved in this appeal are found in 15 U. S. C. Sections 1 and 15 (Supp. V, 1975), the pertinent parts of which are as follows:

Section 1. "Every contract, combination in form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is declared to be illegal • • •"

Section 15. "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor • • • and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee • • •."

STATEMENT OF THE CASE

In this action, Respondents as Intervenors sued Petitioner in the Trial Court for damages, *inter alia*, for violations of Section 1 of the Sherman Act. Judgments on

the verdicts for the Intervenors were sustained by the Eighth Circuit Court of Appeals.

The rulings of the Trial Court as sustained by the Eighth Circuit Court of Appeals were to the effect that the sale of a dry cleaning store which included all equipment, complete operating instructions, an on-going advertising and promotional program and management assistance and use of a Franchise name, constituted a *per se* violation of Section 1 of the Sherman Act without the necessity of proof of individual coercion or proof of an unreasonable restraint on competition or without the necessity of inquiry into whether the sale in fact increased or decreased overall competition.

Statement of the Facts

In 1964, Cleaning Center Sales (later called A. P. Cleaning Center Sales or A. P. C. C. S.) a sales organization of American Laundry Machinery Industries, a division of the Petitioner, contracted with Robsbur, Inc., an agency of Arnold Palmer, a well-known golfer, to license his name and utilize his appearances in the promotion and sale as a "package" of complete one-hour dry cleaning stores. The "package" in addition to the use of the Arnold Palmer name and his continuing promotional activities included all things other than materials and supplies necessary to operate, including dry cleaning machinery, (manufactured not only by a division of Petitioner but by other manufacturers), a leased Sign and Back Drop

with Arnold Palmer's name thereon and all furniture and fixtures, complete operating instructions and other items required to start up in business.

From 1964 through 1971, approximately 400 "package" stores, including those involved in this litigation, were sold.

A. P. C. C. S.'s dealer in the Kansas City area, John R. Jacobson, had owned and operated and sold cleaning establishments under other trade names long prior to becoming a dealer for A. P. C. C. S., and in 1965 owned and operated seven dry cleaning establishments having no connection with A. P. C. C. S.

In 1965 and 1966, Jacobson purchased three "package" A. P. Cleaning Centers, and in each case executed in his own name a lease of the real estate, a Franchise Agreement, a Sign and Back Drop Agreement and a Conditional Sales Contract for the purchase of the equipment and paid sales tax on the purchases.

The A. P. Cleaning Center bought in December 1965 was operated until November 1968 when it was sold as a going business to Respondent Soper's husband who received a Bill of Sale (covering additional equipment not included in the original "package"), a Bulk Sales Affidavit, and an assignment of the real estate lease. Soper's husband subsequently on March 1, 1969, assumed the remaining lease and franchise payments and the unpaid portion of Jacobson's Conditional Sale Contract.

Jacobson operated the two other stores from November 1965 and November 1966 until he sold them as going

businesses to Respondent, Jeffson Industries, Inc. in January of 1969 and in August, 1969.

In each sale to Jeffson Industries, Inc. all documents refer to Jacobson as owner; each Bill of Sale included equipment in addition to that included in the original "package" and in each case Jeffson Industries, Inc. several months later assumed the remaining payments due on the Franchise, Sign and Back Drop Leases, and the unpaid balance of the Conditional Sales Contract debt. At the time of such sales, Jacobson was also the President and half owner of Jeffson Industries, Inc.

During the period he held title individually, Jacobson paid all the expenses, took all the depreciation, retained all the income and absorbed all the operating losses. In selling the stores, Jacobson retained all the profit on the sales.

The Respondents, as Intervenors, sued Petitioner for fraud and misrepresentation, violation of the Anti-Trust Laws and for punitive damages, arising out of the sales of these "package" stores on the theory that Petitioner's dealer was at all times Petitioner's agent and that Petitioner was bound by the agent's statements and representations and that the sales of the operating businesses were the sales of the Petitioner and involved a tying arrangement that violated Section 1 of the Sherman Act.

No evidence was presented that either Respondent Jeffson Industries, Inc. or the husband of Respondent Soper, was compelled to accept "the tie" and was not in truth attracted by the "going-business" aspects of the franchise package.

The Trial Court permitted the Jury to determine that an agency existed and to award verdicts of varying amounts on the several counts.

On the anti-trust counts submitted to the Jury, Respondent Soper received a verdict of $10,000.00. Respondent Jeffson Industries, Inc. received a verdict of $52,000.00. The Trial Court entered judgments on the anti-trust verdicts to Respondent Soper of $10,000.00 trebled to $30,000.00 plus $36,200.00 attorney's fees and to Respondent Jeffson Industries, Inc. $52,000.00 trebled to $156,000.00 plus attorney's fees of $54,300.00.

The Eighth Circuit Court of Appeals sustained the rulings of the United States District Court of the Western District of Missouri, holding that a *per se* violation of the Sherman Act existed which in effect required no further determination as to the issue of coercion in the individual case, or as to the unreasonableness of any restraint, or as to whether or not competition was actually increased or decreased by reason of the existence of such stores.

Rehearing and rehearing en banc were requested and denied.

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REASONS FOR GRANTING THE WRIT

I.

If the licensing of the use of the name of "Arnold Palmer" is a "tying product", the resultant "tying arrangement" does not necessarily unreasonably restrain competition.

Having found a tying arrangement, the Court below states that from this fact flows an inevitable hurt to competition in the tied product market and therefore is a *per se* violation of the Sherman Act.

But other Circuits require "a case by case inquiry under the 'rule of reason' to determine the competitive effects of such restraints if the Sherman Act is to be effectuated". *GTE Sylvania Incorporated v. Continental T.V. Inc.*, 537 F. 2d 980 (9th Cir. 1976).

Such a holding forecloses inquiry into whether the need for "the protection of goodwill as embodied for example in a valuable trademark may justify an otherwise invalid tying arrangement". *Susser v. Carvel Corporation*, 332 F. 2d 505 (2nd Cir. 1964).

II.

A violation of the Sherman Act under the per se doctrine cannot be predicated on the licensing of a franchised name having no prior relationship to the equipment.

The use of the "Arnold Palmer" name is so intertwined with the other elements of the "package" sale of a one-hour dry cleaning store that it cannot be so separate

and distinct a marketable item as to qualify as a "tying product" in a tying arrangement violating the Sherman Act, contrary to the holding of the Court below.

Prior to the inauguration of the A. P. Cleaning Store Program, the name "Arnold Palmer" had no automatic association with dry cleaning and no market penetration in the dry cleaning equipment field. While well known in golfing circles the Arnold Palmer name had value in selling dry cleaning equipment only as it was advertised and promoted as a part of the program incorporated in the "package" form in which it was offered. The Petitioner's contract with Robsbur, Inc. gave Petitioner the use and control of the name but limited Petitioner's power to relicense the name for use only as a part of the "package".

No buyer of dry cleaning equipment would find it of value except as promoted and advertised in an expensive campaign which under the contract with Robsbur, Inc. was limited to the arrangements made in the "package".

The franchise name has no value independent of the advertising program with which it is associated.

See *Fortner Enterprises, Inc. v. U. S. Steel Corp.*, 523 F. 2d 961 (6th Cir. 1975), cert. granted, 96 S. Ct. 1100.

III.

If the licensing of the use of the Arnold Palmer name is a "tying product", the resulting "tie" is not a violation of the Sherman Act in the absence of proof of individual coercion.

No evidence was offered in behalf of either of the Respondents that they were coerced into buying the so-called "tying product", the Franchised name.

Other circuits have held that evidence of coercion of each franchisee is required to substantiate a violation of the Sherman Act. *Ungar v. Dunkin' Donuts of America, Inc.*, 531 F. 2d 1211, (3 CCA-1976). *Response of Carolina Inc. v. Leasco Response*, 537 F. 2d 1307 (5th Cir. 1976).

Neither Soper's husband nor Jeffson Industries, Inc. ever questioned if they could purchase the franchise without the equipment; nor does it make sense to think they would since each was buying an established business.

IV.

A sale of a preexisting facility including equipment and a franchise name does not constitute an illegal tie.

Both Respondents purchased their stores two to three years after the original opening. They did not ask for or receive new Franchise Agreements or new Sign and Back Drop Leases which would have provided for a new five-year term. On the contrary, they assumed the remaining term of each as any purchaser from any non-dealer owner elsewhere would do.

Such a sale does not constitute an illegal transaction. *Beefy Trail, Inc. v. Beefy King International, Inc.*, 348 F. Supp. 799 (M. D. Fla. 1972). This well considered and widely quoted case from a District Court in the Fifth Circuit is contrary to the position taken by the Eighth Circuit.

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CONCLUSION

The Writ of Certiorari should be granted to resolve the conflicts between the circuits as to the issues raised in the Petition and to inhibit the further extension of a rule of law which seems to lessen rather than increase economic competition.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Malcolm D. Young, a member of the Bar of the Supreme Court of the United States, hereby certify that I have served the foregoing Petition for Writ of Certiorari on counsel for Respondents, by depositing same in the United States mail, postage prepaid, on December 28, 1976, addressed to Joseph A. Sherman and Paul A. Wickens, Suite 820, Home Savings Building, 1006 Grand Avenue, Kansas City, Missouri 64106 and upon Sheridan Morgan, Two Crown Center, Suite 400, 2420 Pershing Road, Kansas City, Missouri 64108, counsel for Respondents.

MALCOLM D. YOUNG